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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RAYMOND BALDHOSKY ,

Plaintiff,

v.

SUSAN HUBBARD, et al.,

Defendants.

CASE NO. 1:12-cv-01200-LJO-MJS (PC)

**ORDER DENYING MOTION FOR ORDER
TO SERVE DEFENDANTS BY
SUBSTITUTION OF SERVICE**

(ECF No. 36)

CLERK TO TERMINATE ECF No. 44

**Telephonic Status Conference
Regarding Service:** December 22, 2016 at
10:00 a.m. in Courtroom 6 (MJS)

I. Procedural History

Plaintiff is a former state prisoner proceeding pro se in this civil rights action brought pursuant to 42 U.S.C. § 1983. On May 4, 2016, the Court screened Plaintiff's third amended complaint and found that it stated cognizable claims against ten defendants: Dr. Gonzalez, Dr. Nguyen, Dr. Metts, Physician's Assistant L. Peters, Physician's Assistant T. Byers, Nurse T. Grossi, Nurse Ruff, Nurse Indindes, and Nurse Amanda Kaylor. (ECF No. 31.)

1 On May 12, 2016, the United States Marshals Service was ordered to initiate
2 service on the defendants. (ECF No. 33.) Defendants Gonzalez, Kaylor, and Metts
3 waived service. (ECF Nos. 39.) They then filed a motion to dismiss for failure to state a
4 claim. (ECF No. 40.) The motion is pending.

5 Duc Nguyen waived service on behalf of Defendant Nguyen. (ECF No. 51.) Mr.
6 Nguyen then moved pro se to quash service on the grounds that he mistakenly waived
7 service and he is not the Defendant Nguyen named in the complaint. (ECF No. 55.) This
8 motion also is pending.

9 Waivers of service for Defendants Peters, Byers, Grossi, Indindes, and Dunn
10 were returned unexecuted. (ECF Nos. 45, 46, 56.) According to the Marshals Service,
11 Defendants Dunn and Indindes no longer work for the California Department of
12 Corrections and Rehabilitation. Defendants Peters, Byers, and Grossi were contract
13 employees and are no longer employed with the contracting company.

14 No waiver was returned for Defendant Ruff. However, the Marshals service has
15 informed the Court that her waiver also was returned unexecuted.

16 Plaintiff has filed a motion seeking to serve the remaining defendants through
17 substituted service at their last known place of business, i.e., the California Substance
18 Abuse Treatment Facility in Corcoran, California. (ECF No. 36.) Defendants Gonzalez,
19 Kaylor, and Metts filed a response. (ECF No. 42.) Plaintiff filed a reply, stating that
20 Gonzalez, Kaylor, and Metts do not have standing to oppose the motion on behalf of the
21 absent defendants.¹ (ECF No. 44.)

22 **II. Legal Standard**

23 In cases involving a plaintiff proceeding in forma pauperis, the Marshal, upon
24 order of the Court, shall serve the summons and the complaint.² 28 U.S.C. § 1915(d);
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26 ¹ Plaintiff's reply was docketed as a motion. (ECF No. 44.) The Clerk's Office will be directed to terminate
ECF No. 44 because it is not a motion.

27 ² Defendants imply that Plaintiff is not entitled to service by the U.S. Marshal because he is no longer
28 incarcerated. (ECF No. 42 at 2.) However, the ability to utilize the Marshals Service derives from Plaintiff's
pauper status, not his incarceration.

1 Fed. R. Civ. P. 4(c)(3). “[A]n incarcerated pro se plaintiff proceeding in forma pauperis is
2 entitled to rely on the U.S. Marshals for service of the summons and complaint and [he]
3 should not be penalized by having his action dismissed for failure to effect service where
4 the U.S. Marshal or the court clerk has failed to perform his duties.” Walker v. Sumner,
5 14 F.3d 1415, 1422 (9th Cir. 1994) (internal quotations and citation omitted), overruled
6 on other grounds by Sandin v. Connor, 515 U.S. 472 (1995). “So long as the prisoner
7 has furnished the information necessary to identify the defendant, the marshal’s failure
8 to effect service is automatically good cause” for extending the time for service. Walker,
9 14 F.3d at 1422 (internal quotations and citation omitted). However, where a pro se
10 plaintiff fails to provide the Marshal with accurate and sufficient information to effect
11 service of the summons and complaint, the Court’s sua sponte dismissal of the unserved
12 defendants is appropriate. Walker, 14 F.3d at 1421-22.

13 Waivers of service may be sent to the individual defendant or to an agent
14 authorized to receive service pursuant to Federal Rule of Civil Procedure 4(h). Fed. R.
15 Civ. P 4(d)(1)(A). Personal service may be undertaken in a number of ways. Fed. R. Civ.
16 P. 4(e). The summons and complaint may be delivered personally to the defendant or
17 the defendant’s authorized agent or left at the defendant’s dwelling or usual place of
18 above. Fed. R. Civ. P. 4(e)(2). Alternatively, a defendant may be served by “following
19 state law for serving a summons in an action brought in courts of general jurisdiction in
20 the state where the district court is located or where service is made.” Fed. R. Civ. P
21 4(e)(1).

22 California law is similar. A summons may be served personally on the individual.
23 Cal. Code Civ. P. § 415.10. Alternatively, “a summons may be served by leaving a copy
24 of the summons and complaint during usual office hours in his or her office or, if no
25 physical address is known, at his or her usual mailing address” or “by leaving a copy of
26 the summons and complaint at the person’s dwelling house, usual place of abode, usual
27 place of business, or usual mailing address.” Cal Code. Civ. P. § 415.20.

1 **III. Discussion**

2 At the outset, the Court notes that more than ninety days have passed since the
3 Marshals Service was ordered to serve Defendants. See Fed. R. Civ. P. 4(m).
4 Nonetheless, the Court concludes there is good cause for extending this deadline.
5 Plaintiff has diligently attempted to serve Defendants. Dismissal at this juncture is
6 unwarranted. The Court will provide Plaintiff with an opportunity to be heard on the issue
7 of dismissal if and when it appears that all reasonable efforts to serve Defendants have
8 been exhausted.

9 Plaintiff is advised, however, that his current efforts to effectuate service are
10 somewhat misplaced. As stated, it is Plaintiff's obligation to provide the Marshals Service
11 with sufficient information to identify the Defendants. Walker, 14 F.3d at 1422. With
12 regard to the unserved Defendants, he has not done so. Absent further information, it
13 appears the Marshals Service is unable to locate and properly identify the individuals
14 Plaintiff wishes to serve.

15 Nor may the Defendants be served by delivering the summons to the Defendants'
16 last known business address, as Plaintiff suggests. Because Defendants are no longer
17 employed at that address and do not utilize it as a regular place of business, such
18 service would not be effective under either federal or California law.

19 The Court is cognizant that Plaintiff has limited, if any, ability to identify and locate
20 these Defendants absent Court intervention. In such circumstances, the Court may open
21 discovery for the limited purpose of identifying the Defendants with sufficient specificity
22 to allow Plaintiff to locate them. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th
23 Cir. 1999). Plaintiff may be entitled to subpoena the California Department of Corrections
24 and Rehabilitation and/or the contract employees' employer. Fed. R. Civ. P. 45. Such
25 subpoenas may entitle Plaintiff to a broad range of personal identifying information.

26 Alternatively, the Office of the Attorney General, who represents Defendants
27 Gonzalez, Kaylor, and Metts in this action, may agree to provide some of this information
28

1 voluntarily. For example, defense counsel may agree to provide these Defendants'
2 current addresses for service of process, either directly to Plaintiff or to the Court in
3 camera.³ Or, counsel may agree to provide Plaintiff with sufficient information to attempt
4 to locate Defendants on his own, such as the Defendants' full names and last known
5 addresses.

6 In light of these considerations, the Court will set the matter for a telephonic status
7 conference to discuss service of process and to attempt to resolve these issues.

8 **IV. Conclusion and Order**

9 Based on the foregoing, it is HEREBY ORDERED that:

- 10 1. Plaintiff's motion for order to serve defendants by substitution of service
11 (ECF No. 36) is DENIED;
- 12 2. The matter is set for a telephonic status conference on December 22, 2016
13 at 10:00 a.m. in Courtroom 6 (MJS).
- 14 3. The parties may participate in the hearing by calling (888) 204-5984 and
15 then entering access code 4446176#.

16
17 IT IS SO ORDERED.

18 Dated: November 27, 2016

/s/ Michael J. Seng
19 UNITED STATES MAGISTRATE JUDGE

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28 ³ In the Court's experience, the Office of the Attorney General frequently is able to locate former employees, including contract employees, with a modicum of effort.